U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: AUG. 17, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a staffing company, seeks to employ the Beneficiary as a registered nurse. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on two grounds: (1) that the Petitioner did not establish its ability to pay the proffered wages of all the beneficiaries of the Forms I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed; and (2) that the instant petition was not accompanied by a valid prevailing wage determination.

The Petitioner filed a motion to reopen,[1] which the Director denied. The Director found that the motion lacked a regulatory required statement and that the Petitioner did not present any new facts to warrant reopening the petition.

On appeal the Petitioner asserts that it did submit new facts and associated documentation in support of its motion to reopen, contrary to the Director's finding, and that the record as a whole establishes its ability to pay the proffered wages of all the beneficiaries of its I-140 petitions (I-140 beneficiaries). The Petitioner also asserts that the Director did not properly consider the evidence it previously submitted in support of its contention that the prevailing wage determination that accompanied the I-140 petition was valid.

Upon *de novo* review, we find that the Petitioner has demonstrated the erroneous nature of the Director's decision to deny the Petitioner's motion. On appeal, therefore, we will consider the evidence submitted in support of the prior motion to determine the merits of the Petitioner's claims that the petition was supported by a valid prevailing wage determination and that it had established its ability to pay. We find that the prevailing wage determination submitted is valid for the instant petition and will withdraw the Director's finding to the contrary. However, for the reasons discussed

[1] A motion to reopen must state new facts and be supported by documentary evidence. *See* 8 C.F.R. § 103.5(a)(2).

hereinafter we find that the Petitioner has not established its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries.

I. LAW

This petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.* Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15. If USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the ETA Form 9089. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

> The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date[2] of the petition onward. The priority date in this case is November 9, 2015. The ETA Form 9089 states that the wage offered for the job of registered nurse is $72,950 per year.

[2] The "priority date" of a petition is ordinarily the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). Since this petition is for a Schedule A occupation, the ETA Form 9089 is not certified by the DOL and the priority date of the petition is the date that it along with the uncertified ETA Form 9089 is filed with USCIS.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case, there is no evidence that the Beneficiary has been employed by the Petitioner at any time since the priority date. Therefore, the Petitioner cannot establish its ability to pay the proffered wage based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. However, when a petitioner has filed other I-140 petitions, the Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the every other I-140 beneficiary from this petition's priority date until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).[3] Thus, the Petitioner in this case must establish that its net income or net current assets in a given year are sufficient to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

In a request for evidence (RFE) issued on October 25, 2016, the Director requested the Petitioner to submit a list of all I-140 petitions it filed during 2015 and in 2016 up to the date of the RFE, the proffered wage and priority date of each beneficiary, evidence of any wages paid to these beneficiaries, the status of each petition (pending, approved, or denied), and whether any beneficiary had obtained lawful permanent resident (LPR) status. In response to the RFE the Petitioner submitted a chart listing 78 beneficiaries for whom it had filed I-140 petitions during the requested time period in 2015 and 2016, along with their priority dates, and their proffered wages, which totaled over $1 million in 2015 and over $4 million in 2016. The chart contained no information about any wages paid to the I-140 beneficiaries, the status of their petitions, or the date of any

[3] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

claimed LPR status. Thus, the Petitioner did not provide all of the information requested by the Director in the RFE. The chart has not been updated by the Petitioner since then, nor expanded to include the other information requested in the RFE.

The record includes copies of the Petitioner's federal income tax returns, Forms 1120, for 2015 and for 2016. The 2015 tax return recorded net income of $26,782 and net current assets of $132,289, while the 2016 tax return recorded net income of $45,901 and net current assets of $178,190.[4] Thus, in both 2015 and 2016 the Petitioner's net income and net current assets were far below their total proffered wage obligations to their I-140 beneficiaries. Accordingly, the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of November 9, 2015, onward based on its net income or net current assets in 2015 and 2016.

USCIS may also consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner indicates that it has been in business since 2012 and had 25 employees at the time the petition was filed in 2015. The record includes copies of the Petitioner's federal income tax returns for the years 2014-2016. The tax returns recorded gross receipts of $1,547,306 in 2014, $2,060,924 in 2015, and $2,111,265 in 2016. While these figures indicate that the business grew during that three-year period, they do not cover a sufficient period of time to draw any conclusions about whether the Petitioner has an established pattern of growth. The income tax returns indicate that the Petitioner's expenditures on salaries and wages were static in the years 2014-2016, going from $1,152,126 in 2014, to $1,056,651 in 2015, to $1,069,457 in 2016. These figures were all far below the Petitioner's total proffered wage obligations as of October 2016. The Petitioner asserts that previously submitted evidence, including a copy of a contract with which it describes as a wholly-owned recruitment arm of the , exhibit D of the contract showing the local pay rates for professional staff, including nurses, placed by the Petitioner in the market, and a printout stating that the is part of the conglomerate, establishes its ability to pay the proffered wage of the instant Beneficiary. According to the Petitioner, it provides nursing staff to clients through , gets paid $52.55 per hour for registered nurses (non-specialty) like the Beneficiary, will pay the Beneficiary $35.10 per hour in accord with the proffered wage, and will therefore earn

[4] Net income was recorded on page 1, line 28, of the Forms 1120. Net current assets were determined by calculating the difference between current assets and current liabilities, as recorded in lines 1-6 and lines 16-18 of Schedule K.

income of $17.45 per hour from the Beneficiary's service to the HCA client. Since the Beneficiary is not yet employed by the Petitioner, this contractual arrangement has not been applied and the Beneficiary has not earned any income for the Petitioner. Nor is there any evidence that any of the other I-140 beneficiaries has generated any income for the Petitioner based on this contractual arrangement. As previously noted, the Petitioner has provided no information regarding the wages paid to its other I-140 beneficiaries, and there is no evidence that any of them are employed by the Petitioner. The Petitioner must establish its ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of this petition onward. For the reasons discussed above, the Parallon contract does not represent persuasive evidence of the Petitioner's ability to pay the proffered wages of all its I-140 beneficiaries, which amounted to $4,274,061 as of October 25, 2016, according to the chart provided by the Petitioner in response to the RFE.

Based on the evidence of record, therefore, we find that the Petitioner has not established its ability to pay the proffered wages of all its I-140 beneficiaries from the priority date of November 9, 2015, onward based on the totality of its circumstances, as in *Sonegawa*.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established its eligibility for the immigration benefit sought. Specifically, the Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of this petition up to the present.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-C-P-*, Inc. ID# 1382910 (AAO Aug. 17, 2018)